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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1382

DOUGLAS MacLEOD,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

IRL B. BARIS
LEONARD J. FRANKEL
NEWMARK and BARIS
721 Olive Street
St. Louis, Missouri 63101
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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DOUGLAS MacLEOD,
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v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Douglas MacLeod, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on January 25, 1971.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals on January 25, 1971, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto.

An order was entered by District Judge Meredith on November 6, 1969, overruling petitioner's motions to dismiss Indictment, to suppress evidence, for production of Grand Jury minutes, for production of favorable evidence, and for discovery and inspection (A. 1, 12),[1] but no opinion was written.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 25, 1971 (Appendix B hereto). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

I

Whether petitioner should have been granted a directed verdict of acquittal because the government, in not proving guilty intent, failed to make a submissible case against him.

II

Whether, in view of petitioner's stipulation and admission at the trial that he failed to file returns and that he had sufficient income to require the filing of returns, the government should have been permitted to introduce evidence of specific checks and items of petitioner's income.

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[1] The certified transcript of the record prepared at petitioner's request by the Clerk of the United States Court of Appeals for the Eighth Circuit includes the Appendix filed in said Court pursuant to Rule 30 of the Federal Rules of Appellate Procedure. On July 29, 1970, the Court of Appeals entered an order permitting petitioner to file an abridged appendix to include all relevant docket entries, pleadings and orders, and narration on all essential evidence.

Reference in this petition to such appendix shall be by use of the letter "A.", followed by the appropriate page number.

III

Whether petitioner should have been permitted at the pre-trial hearing to examine the IRS special agent concerning the effect of petitioner's political background on the motivation to prosecute petitioner.

IV

Whether petitioner was entitled to Miranda warnings when first questioned by the IRS special agent.

V

Whether the trial Court erred in giving portions of the charge and in refusing to give instructions offered by petitioner.

VI

Whether petitioner should have been permitted to examine the presentence investigation report prior to sentencing.

VII

Whether the statute under which petitioner was convicted (26 U. S. C., Section 7203), is constitutional as written and as applied to petitioner in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States

IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Statutes of the United States

26 U. S. Code, §7203. **Willful failure to file return, supply information, or pay tax.**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax

or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalities provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Rules of Court—Federal Rules of Criminal Procedure. Rule 32. **Sentence and Judgment.**

* * * * * * *

(c) Presentence Investigation.

* * * * * * *

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

STATEMENT

Petitioner was convicted on a three-count indictment (A. 3-5), charging him with violations of Section 7203 of the Internal Revenue Code, 26 U. S. C., Section 7203, in that, by reason of the amount of his gross income, he was required to make an income tax return, but "he did willfully and knowingly fail to make said income tax return

to the said Director of Internal Revenue, or to any other proper officer of the United States." Count I related to the calendar year 1963 and alleged a gross income of $35,-133.56; Count II related to the calendar year 1964 and alleged a gross income of $12,821.92; Count III related to the calendar year 1965 and alleged a gross income of $18,-143.53.

After pleading not guilty, petitioner filed separate motions to dismiss the indictment (A. 5-7), to suppress evidence (A. 7), for production and inspection of Grand Jury minutes, for production of favorable evidence, and for discovery and inspection. At the hearing on these motions petitioner called Special Agent Joseph T. Noelker of the Internal Revenue Service as a witness. He testified that after he was assigned to the investigation of petitioner in late 1965, he checked background information (A. 14). He acknowledged that he had learned that petitioner had appeared before a Congressional Commit'ee, but petitioner was not permitted to examine the witness concerning his information as to petitioner's prior political background (A. 14).

Mr. Noelker's first telephone conversation with petitioner was on April 25, 1966, but he did not advise petitioner of his rights under the Fourth, Fifth and Sixth Amendments until August 1966, when he had his first meeting with him (A. 14). In the meantime, petitioner had contacted an accountant, who, at petitioner's direction and prior to the advice of his rights, furnished information to Mr. Noelker which the accountant had received from petitioner (A. 15). The accountant told Mr. Noelker on April 27 that petitioner had not filed tax returns (A. 16).

All of petitioner's pre-trial motions were overruled from the bench immediately after the hearing (A. 16).

The evidence at the trial revealed that petitioner was born in 1908 in Alabama. At the age of 15 he entered college and ultimately received a law degree from the University of Alabama (A. 26-27). He was a lawyer since 1934 (A. 33), but did not practice immediately after law school. He abstracted titles in Texas, edited for Corpus Juris in New York, adjusted claims, and taught (A. 27). In 1942 he entered the Air Force and served for 44 months, of which 22 months were overseas. After discharge from service he settled in St. Louis with his wife and young child (A. 27). He then took special courses at Washington University in St. Louis and became licensed to practice law in Missouri in 1947 (A. 27). He worked for about a year as an employee of another lawyer and then became a sole practitioner (A. 27). As a result of some referrals of maritime damage suits, he began to receive a number of these cases and became a specialist in the maritime field, in which he is still engaged (A. 28). A number of cases were referred to him by attorneys, and he also associated other attorneys with him in handling these cases (A. 40-41). He is licensed to practice in federal courts in the St. Louis area and has tried cases in state courts. He has argued a case in the United States Supreme Court (A. 27, 37). He has never prepared a tax return for another person (A. 30).

Petitioner's tax problems began in the 1950's. In 1959, 1960 and 1961 he had been delinquent in filing his returns, and subsequently the government levied on his property to collect taxes (A. 36, 37). He stipulated (A. 17) and admitted in his testimony that he did not file tax returns for 1963, 1964 and 1965 (A. 29), although he knew he was required to file returns and to keep records (A. 31). He had also not filed for 1962. In previous years he had apparently applied for extensions of time to file returns, but they had not been granted. He did not apply

for extensions for the years 1962 through 1965, although he knew that he could have applied; he felt extensions would not have been granted (A. 36).

The reasons given by petitioner to Special Agent Noelker for the failure to file and the courtroom explanation were that he had a sloppy way of doing business, he had personal problems, and he procrastinated (A. 22, 23, 29, 30-31). On cross-examination, petitioner testified (A. 30-31): "I believe the reason or the reasons I gave to Mr. Noelker at the time that I talked to him, the reasons were a sloppy method of handling my office affairs, lack of adequate records so that I was not in a position to know what my status was. A personal problem, which upon inquiry he developed showed to be excessive drinking. And the third reason was a tendency toward procrastination, probably associated with but even independent of the question of drinking."

When Mr. Noelker became aware that petitioner had not filed tax returns for the years in question, he called petitioner on April 19, 1966, but they did not meet until August 22, 1966 (A. 21). Prior to this meeting, petitioner made all of his records available to Robert Feldman, an accountant whom he retained. Based upon information which petitioner got from his files and from bank statements and cancelled checks which he examined, Mr. Feldman arrived at some figures of income and disbursements for the years 1963, 1964 and 1965 (A. 17, 20-21). He prepared work sheets and tax returns for the years 1962 to 1965, and delivered the returns to petitioner (A. 18). Petitioner never filed these returns because he knew that Mr. Noelker was conducting an investigation at that time and would have the same information that Mr. Feldman had (A. 29-30). Mr. Feldman and Mr. Noelker had some conversations (A. 18, 21), and the accountant supplied his figures to the agent (A. 20).

When petitioner and Mr. Noelker first got together on August 22, 1966, the agent advised him of his Miranda rights, and petitioner admitted that he had not filed the tax returns (A. 21-22). Petitioner made his records available to the agent on April 4, 1967 (A. 22). Mr. Noelker computed income figures from information received from petitioner, Mr. Feldman and his work papers, court records, bank records, insurance companies, clients, and defendants and their attorneys (A. 22).

Petitioner cooperated fully with the agent in his investigation. He did not attempt to conceal anything or to evade the payment of any taxes (A. 22). He had instructed Mr. Feldman to cooperate fully with Mr. Noelker (A. 24), and Mr. Feldman was under the impression that petitioner was not trying to conceal any income or hide any information (A. 20). Petitioner made all of his files and information available to the agent and the accountant. Even though he could have stood on his constitutional rights, he did not attempt to conceal anything from either of them (A. 30).

At the trial petitioner stipulated that in the years in question his income was over $600.00 and, in fact, stipulated for purposes of the trial that the amount alleged in each count of the indictment was accurate (A. 16-17). On the issue of intent, petitioner presented evidence of his sloppy way of doing business, procrastination, and drinking and health.

As to the method of doing business and procrastination, petitioner did not have a full-time secretary except occasionally his wife (A. 28, 36). When Mr. Noelker called petitioner, an answering service took the message, and neither he nor Mr. Feldman ever saw a secretary at the office (A. 19, 23). Total stenographic expense, according to Mr. Feldman's worksheets, were $61.00 for 1963, $32.00 for 1964, and $131.45 for 1965 (A. 19). Petitioner kept

no records except for notations on the inside of files. His only records consisted of the individual files and bank records (A. 28). Files were strewn around his office without any filing system—some were in file cabinets, some on the desk, and some on a closet shelf (A. 28). Mr. Feldman, Mr. Noelker and Mr. Murphy, an attorney, all confirmed that files were stacked on shelves and not in file drawers (A. 19, 24, 40). Petitioner used his bank account for business as well as personal expenses (A. 19, 30, 31). His bar enrollment fee was paid late in every year and, although it was due on January 20, he did not pay until April 17, 1964 for that year (A. 24, 28, 30). He had no books and records as a self-employed person and no W-2 statements (A. 31). He did not even open his monthly bank statements but piled them in a drawer for four or five years (A. 32). He told Mr. Noelker that "his bank records and other records were all mixed up . . . and that his files were a mass of confusion" (A. 23).

There was considerable evidence as to petitioner's drinking and health problems. Mr. Feldman and Mr. Noelker recalled examining checks to liquor establishments (A. 20, 24) and petitioner's handwriting was different on some checks. Mr. Feldman gave a statement to Mr. Noelker during the investigation that petitioner had told him that he had not filed because of neglect due to health reasons (A. 20). In their initial meeting, petitioner told Mr. Noelker that he had been in and out of hospitals and institutions on several occasions to dry out, that there were periods when he was not lucid for a week or more at a time and practiced law on a limited basis, that cases had to be postponed because he was unable to be in court, that he did not have patience to sit down and figure out his income, and that because of his mental condition brought about by his excessive drinking he was not capable of computing his income or of assisting someone to compute it. He also told Mr. Noelker that he had been

in Edgewood Sanitorium, and he made arrangements for the agent to examine his records there (A. 23). On one occasion when Mr. Noelker visited him at his house in March, 1967, petitioner was seated on his bed, very incoherent, drunk, with whiskey bottles in the bedroom (A. 23).

Petitioner testified that he first started drinking at the age of 15 and continued thereafter on a social basis. His drinking did not become a problem, however, until the late 1950's (A. 28-29). About that time he had an occasional blackout or a semi-blackout (A. 29). He was first hospitalized in 1962 for a hernia operation but experienced delirium tremens (A. 29). Thereafter his drinking continued and he was hospitalized on a number of occasions for his drinking (A. 29, 36). Frequently he signed himself out in a shaky signature on a protest release, against medical advice (A. 37-38). He was able to write and endorse checks but some were scrawled (A. 33, 36) and showed that he was under the influence of liquor (A. 33).

Although he practiced law and went to court during the years in question, he worked on a limited basis and there were times when he was unable to function or appeared in court intoxicated. He generally had other attorneys associated with him to "pinch-hit" for him (A. 30, 33, 35, 38). Although some of the cases which were settled during the subject years generated a considerable amount of income, frequently they involved work over a period of several years (A. 25, 37). His performance was dependent upon his physical and mental condition (A. 35).

Other attorneys also testified as to petitioner's drinking. Joseph Cohn, an East St. Louis attorney, had known petitioner since 1946 or 1947 and knew that his drinking accelerated in the late 1950's. They were associated on a

number of cases together, and he testified to instances when petitioner was unable to function in court or had been drinking when he came to court (A. 25, 26). At times Mr. Cohn was either unable to contact petitioner or, when he did, petitioner was under the influence of alcohol (A. 25). He noticed the deterioration of petitioner during the subject years and knew that he was in the hospital on several occasions (A. 26).

Joseph Murphy, a St. Louis attorney, had been acquainted with petitioner since 1953. They were always on opposite sides of every case (A. 38). He was aware of petitioner's acute drinking problem during the subject years which caused the preparation of his cases to slow down (A. 38). When cases were neglected because of the drinking, Mr. Murphy either had to wait until petitioner sobered up or he handled the cases with other attorneys associated with petitioner (A. 39). During the subject years petitioner was sober on occasions and they settled cases (A. 40). At other times he would be incoherent on the phone and Mr. Murphy could not deal with him (A. 39). There were occasions when petitioner was at depositions and appeared to have been drinking (A. 39-40), but to Mr. Murphy's knowledge, he never appeared in court under the influence of alcohol (A. 40).

S. Eldridge Sampliner, a maritime attorney living in Miami, Florida, had been associated with petitioner in a number of cases and told of specific cases in which petitioner was too drunk to appear in Court (A. 41, 42) or was incoherent on the phone (A. 41). He was too drunk to handle a settlement of one case (A. 41) and on another case was "in a great state of intoxication" (A. 42). When he was not drinking, petitioner was very competent in cases, but because of the drinking problem, Mr. Sampliner insisted on having other attorneys associated in the cases (A. 42).

Hospital records indicated that petitioner was in Cochran Veterans Hospital for a hernia operation in 1962 but began hallucinating and having delirium tremens, and the operation had to be delayed (A. 43-44). He was in Edgewood Sanitorium on six occasions between 1963 and 1968 for various periods of time, all related to drinking, the records indicating his scrawled handwriting on protest releases against doctor's advice (A. 45-47). He was in Jewish Hospital between 1965 and 1969 on ten different occasions, two of which were for a heart condition; the others were for various periods of time because of his drinking, with another episode of delirium tremens (A. 47-51).

Dr. Saul Niedorf, a psychiatrist, testified as to the nature of petitioner's illness caused by drinking and expressed the opinion that there was a causal relationship between the drinking and his failure to file the tax returns (A. 55). There are three stages of such an illness: (1) blackouts, (2) delirium tremens, and (3) altered attitudes and behavior (A. 56). The third stage is characterized by neglect of oneself and one's responsibilities, careless or carefree attitude, an insouciant attitude, without worries, without concern (A. 56). There is an acute brain syndrome with adverse effects of alcohol (A. 57).

On cross-examination Dr. Niedorf testified that he saw petitioner in all three stages (A. 58). Even in this condition he could settle lawsuits (A. 60), but the illness would prevent him from filing tax returns (A. 61).

At the close of all the evidence, the Court overruled petitioner's motion for judgment of acquittal. The cause was submitted to the jury after argument and the Court's charge to the jury, to which petitioner had made certain objections. The jury returned a verdict finding petitioner guilty on each count (A. 13). Petitioner's motion for judgment of acquittal or, in the alternative, for a new trial was thereafter overruled (A. 13).

Immediately prior to sentencing, petitioner requested permission to examine the presentence investigation report, but permission was denied (A. 67). Petitioner was sentenced to a term of imprisonment for one year and a fine of $10,000.00 on Count I. As to Counts II and III, the imposition of sentence was suspended and petitioner was placed on probation for a period of five years to begin with the completion of the imprisonment, with the condition that during the five-year period he remain gainfully employed and not take a drink (A. 67).

Although released from custody on bail after sentencing, petitioner was for the first time restricted in his movements to the Eastern District of Missouri, and permission to travel outside the district was explicitly denied. The Court of Appeals subsequently removed the restrictions and petitioner was permitted to travel outside the district.

Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit (A. 68). His conviction was affirmed by the Court of Appeals on January 25, 1971, in an opinion written by Circuit Judge Bright and concurred in by Circuit Judge Van Oosterhout and District Judge Neville (Appendix A).

REASONS FOR GRANTING THE WRIT

Petitioner believes that there are numerous reasons for review on writ of certiorari of the decision of the Court of Appeals. Seven major questions have been presented for review. The reasons why petitioner believes these questions should be reviewed by this Court are:

1. The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals (See Questions I, II, III, IV, and V).

2. The decision of the Court of Appeals decides important questions of federal law which have not been, but

should be, settled by this Court (See Questions II, III, IV, VI, and VII).

3. The decision of the Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court (See Questions I, IV, and V).

4. The decision of the Court of Appeals departed from the accepted and usual course of judicial proceedings, and guidelines thereon should be established by this Court for the benefit of the Courts of Appeals. Specifically the Court of Appeals summarily disposed of numerous issues of merit and importance raised by petitioner in the Court of Appeals and failed to discuss some such issues (See Questions I, V, and VII).

In the order in which the questions have heretofore been presented, they will now be discussed in this argument so as to amplify the reasons why petitioner believes it is important for the Court to review the decision of the Court of Appeals on each of these questions (For the convenience of this Court, petitioner will restate each question presented prior to the argument).

I

Whether petitioner should have been granted a directed verdict of acquittal because the government, is not proving guilty intent, failed to make a submissible case against him.

Petitioner believes that the evidence wholly failed to sustain the conviction and that the Court of Appeals decision's cursory disposition of this issue should be reviewed by this Court. There are three basic elements to the crime charged under Title 26, United States Code, Section 7203: (1) duty to file a return, (2) failure to file a return, and (3) willfulness or guilty intent. In this case, petitioner stipulated as to the first two elements; the sole issue was one of willfulness or intent. But there was not

sufficient evidence of intent because the government failed to produce any positive proof showing guilty intent and petitioner's evidence negated the existence of any guilty intent.

The Court of Appeals here found guilty intent in petitioner's conduct of his law business, even though the evidence conclusively showed that it was conducted on a very sporadic basis. And the Court of Appeals opinion completely disregarded the defensive evidence and the applicable law as determined by this Court and other Courts of Appeals.

In determination of the intent question, it is important to examine what prior opinions have said about the requirements of such intent. In **United States v. Murdock**, 290 U. S. 389, 394-396, this Court had occasion to consider the meaning of willfulness as required by the predecessor of Section 7203. This Court made clear that it meant more than a mere intentional, knowing or voluntary act, as distinguished from accident. It means an act done with a bad purpose; "an evil motive is a constituent element of the crime." The mere failure to measure up to the standards of conduct prescribed in the statute would not make such conduct criminal.

The necessary intent or mens rea was explained subsequently by this Court in **Spies v. United States**, 317 U. S. 492, in which the defendant's felony conviction for tax evasion was reversed. Interestingly, the defendant there, as here, admitted at the opening of the trial that he had sufficient income to require him to file a return and pay the tax, and that he failed to do so. There was considerable evidence by the government as to the amount of tax due and the manner of receiving and handling income and accounting. The defendant's testimony related to his good character, physical illness, and lack of willfulness because of a psychological disturbance amounting

to something more than worry but less than insanity. Although defendant was indicted for tax evasion (felony) and not for the misdemeanor of either failing to pay the tax or making a return, the government contended that proof of the two misdemeanors constituted sufficient evidence to prove the felony. This Court stated (l. c. 497-498):

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return, might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax **where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree.** We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." (Emphasis supplied.)

Unfortunately, this Court has never fully defined the requirements for proof of willfulness under Section 7203. It has, however, indicated in **Sansone v. United States,** 380 U. S. 343, in discussing the elements of the felony and misdemeanor provisions of Sections 7201, 7203 and 7207,

that the willfulness proof must be the same for the felony and misdemeanor, the distinction being that in the felony case there must be commission of an affirmative act to show the attempted evasion of the tax, whereas in the misdemeanor case, it is sufficient that there be an omission to act. But in either case, the degree of willfulness is the same.

Cases in the Courts of Appeals have discussed the requisites of willfulness in failure-to-file cases. In **Lumetta v. United States**, 8 Cir., 362 F. 2d 644, the Court stated (l. c. 646): "The resulting consensus imposes upon the government the duty of providing substantial evidence that the failure to file a return was prompted by a bad purpose and without grounds for believing that the failure to file was lawful, as opposed to a careless, thoughtless or inadvertent oversight." The Eighth Circuit approved an instruction which required the government to prove, as to bad purpose and evil motive, "the deliberate intention not to file a return which the defendant knew the law required him to file so that the government would not know the extent of (his) liability." Willfulness, in the light of the particular defenses in the case, was proved by the substantial receipts and disbursements of the company, the defendant's deep involvement in these transactions, his astuteness in corporate affairs, and his signing of prior corporate returns.

In **Gennaro v. United States**, 8 Cir., 369 F. 2d 106, the Court affirmed a conviction under Section 7203 for failure to pay the gamblers occupational tax. The Eighth Circuit reviewed many authorities and asked (l. c. 111): "Are there factors present in the evidence which, directly or by inference, establish the 'evil motive,' 'specific wrongful intent' or 'bad purpose'—requisite elements of 'willfulness' as used in the statute?" Ample evidence of willfulness was found in the defendant's admitted ef-

forts to conceal his activities and much circumstantial evidence, including the defendant's furtive manner of transacting business and other affirmative acts and conduct.

In **United States v. Palermo**, 3 Cir., 259 F. 2d 872, the Court thoroughly reviewed the evidence and discussed a number of cases in a prosecution under Section 7203 for failure to pay the tax. The Third Circuit reversed the conviction because willfulness had not been proved and the trial Court applied improper standards.

In **Haner v. United States**, 5 Cir., 315 F. 2d 792, the Court reversed and remanded a conviction for failure to file returns for three years. The real issue was the question of willfulness, with the principal defense being that the defendant was unaware of his legal obligation to file a return. (It is significant that the gross income for the three years ranged from $62,000.00 to $100,000.00.) In rejecting as plain error an instruction that willfulness includes careless disregard[2] and in overruling the government's argument that less is required to prove willfulness in a misdemeanor, the Fifth Circuit said (l. c. 794):

> "'Willful' generally means intentional, knowing, or purposeful, **as opposed** to careless, thoughtless, heedless, or inadvertent, and it means nothing less as used in Section 7203.
>
> "When the nature of appellant's defense is considered, it being essentially that, though he may have been careless or negligent in not filing a return, his failure to file was not knowing and willful, we think it clear that the charge was most prejudicial."

In **United States v. Vitiello**, 3 Cir., 363 F. 2d 240, the court reviewed numerous cases and reversed a conviction

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[2] Cf. **Lumetta v. United States**, 8 Cir., 362 F. 2d 644, 646-647 (fn. 3).

for failure to file returns because it was plain error to instruct that willfulness was characterized by careless disregard of a legal obligation.

Based upon the foregoing authorities, we believe that the evidence in this case was insufficient to sustain a conviction and that the Court of Appeals did not properly apply the law in affirming the conviction. There was, of course, no dispute that petitioner had not filed the tax returns and that he was required to do so. In fact, petitioner stipulated to that effect (A. 16-17). The sole issue related to willfulness or guilty intent, about which there was no evidence by the government except for their contention that evidence as to amounts of checks related to that issue. (But see Question II of this Petition.) There was no evidence as in the **Gennaro** case of any furtive activities of petitioner which would indicate an intent to cover up or conceal or which might have proved that there was a bad purpose or evil motive. There was nothing to indicate that petitioner failed to file the return so that the government would not know the extent of his tax liability. To the contrary, as soon as the investigation began, petitioner cooperated fully with the special agent and furnished all of his information to his accountant with instructions to cooperate with the agent (A. 20, 22, 24, 30). From the very outset petitioner gave the same reasons (Cf. **Gennaro** and **United States v. Litman**, 3 Cir., 246 F. 2d 206) for his failure to file the returns: sloppiness, personal problems and procrastination. These were the reasons given to the special agent (A. 22, 23, 29), the reasons of which the accountant was aware (A. 20), and the same reasons given by petitioner at the trial (A. 30-31).

The only evidence offered by the government related to a number of cases in which petitioner was attorney and

checks which he received. Assuming this evidence was admissible (see Question II of this Petition), petitioner never disputed the receipt of the money. But it was obvious from the testimony, not only of petitioner but of the accountant and the special agent, that records were not well kept and that information as to income had to be determined from each file and bank statements and cancelled checks. In the light of petitioner's uncontradicted explanation as to his lack of office systems (A. 28), which was in fact corroborated by Mr. Feldman, Mr. Noelker, and Mr. Murphy (A. 19, 24, 40), it is crystal clear that the failure to file the returns was not due to any willfulness of petitioner, but was a result of his careless and negligent method of operating his office. Such negligence, carelessness, sloppiness and procrastination, combined with his drinking and illness, could not rise to the dignity of willfulness to provide the mens rea for violation of Section 7203.

In all of the reported decisions which we have examined of convictions under Section 7203, there is far more evidence of willfulness than in the instant case. We have been unable to find any case in which there was such a paucity of evidence as here in which a conviction was sustained. See the **Palermo** case where the Court reversed the conviction because of insufficiency of the evidence, and where the evidence was greater than in the instant case.

It must be borne in mind that a violation of Section 7203 requires proof of willfulness or mens rea to commit the offense. The statute defines an offense which is malum prohibitum or, one might say, malum mandatum. The statute requires an affirmative act, but the criminal omission to do that act must include the specific intent of willfulness. If the mere omission to perform the act

were sufficient for conviction, then the statute would not use the word "willfully."[3] This is made clear by the **Sansone** case. And the **Spies** case makes clear that there must be a "willful failure to disclose the liability."

Thus, we believe that the government's evidence standing alone was insufficient to make a submissible case. Petitioner's motion for judgment of acquittal at the close of the government's case should have been sustained. But after petitioner's uncontradicted evidence, there was all the more reason for sustaining the motion for judgment of acquittal at the close of the entire case.

Petitioner, Mr. Murphy, and Mr. Sampliner confirmed the evidence of petitioner's methods of conducting his business and his drinking and illness. Mr. Feldman, Mr. Noelker and Mr. Murphy all corroborated petitioner's testimony that files were strewn all over the office without any filing system (A. 19, 24, 28, 40). There was no secretary in the office (A. 19, 23). Information could be gleaned only from the inside of files, cancelled checks and bank statements.

There was no evidence that petitioner's sloppy method of conducting his business affairs was for a bad purpose or with evil motive (**United States v. Murdock**, 290 U. S. 389, 394, 395) or to avoid disclosure of his tax liability **Spies v. United States**, 317 U. S. 492, 498) or so that the government would not know the extent of his tax liability (**Lumetta v. United States**, 362 F. 2d 644, 647). If there had been such evidence, then it might have justified submitting the case to the jury on the issue of willfulness. But evidence of sloppiness does not suffice.

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[3] Cf. § 253 of Revenue Act of 1918, an ancestor of § 7203, which imposed a fine of $1000.00 for (non-willful) failure to make a return. This provision was deleted in § 1017 of Revenue Act of 1924.

We are not unaware of cases involving attorneys who have failed to file tax returns in which various courts have made reference to the fact that the defendant is an attorney, knowledgeable in the law and well aware of the requirements of filing tax returns. We reiterate that there is no dispute here that petitioner was required to file tax returns, but knowledge of such requirement is not equivalent to willfulness in failing to file. Furthermore, the fact that petitioner here is an attorney does not charge him with special knowledge as to tax returns; to the contrary, it was evident that petitioner was engaged in a highly specialized field of the law having no relationship to the tax law, and, although petitioner was an extremely competent lawyer in his specialized field, he had never prepared a tax return for another person (A. 30).

Finally, to negate any willfulness in this case petitioner produced evidence of his illness and drinking habits. Although there was evidence that petitioner was able to practice law, because of his drinking and health problems, he utilized the assistance of other attorneys. His impairment was confirmed by the government's witness, Mr. Cohn (A. 25-26), by Mr. Murphy, an attorney who was always an opponent of petitioner (A. 38-40), and by Mr. Sampliner, who testified as to specific cases in which petitioner was involved (A. 41-42). The testimony demonstrated that petitioner frequently required the goad of immediate necessity.

We submit that this attitude applied to petitioner's tax obligations. Petitioner explained to Mr. Noelker and to the jury that he did not file his returns because of sloppiness in the method of handling office affairs, personal problem (excessive drinking), and a tendency toward procrastination (A. 30-31). Dr. Niedorf confirmed the existence of these qualities (A. 56-57). When pressure was brought upon him by the entry of the special agent into the case long after the last return was due, he finally took

steps to determine the state of affairs respecting his tax liability; at that point he called in an accountant and co-operated fully with him and the special agent. Had there been a method of applying pressure during the tax years for the filing of these returns, it is certain that petitioner would not be in court on this matter.

The medical evidence was clear and convincing that petitioner did not have the requisite mens rea. There was uncontradicted testimony as to his numerous hospitalizations before, during and subsequent to the tax years, most of which were related to his drinking problems. Petitioner had been drinking from an early age; the testimony throughout indicated that drinking was an important characteristic of his activity. It had progressed to the point that when he first entered the hospital in 1962 for an operation unrelated to his drinking, he experienced delirium tremens (A. 29, 44). He was thereafter frequently hospitalized for drinking and often secured his release against medical advice (A. 37-38, 44-47).

All of the medical and drinking history was hypothesized to Dr. Niedorf in a question (A. 52-55) as to whether there was a causal relation between petitioner's condition and his failure to file income tax returns. The doctor stated "that there is a causal relationship between the events as described and the events in question, such as the failure to file a tax return" (A. 55). During earlier examination of the doctor by the trial Court, the following occurred (Original typewritten transcript, p. 237):

> "The Court: Well, do you think in your opinion that this (defendant's drinking and medical history) prevented him from filing income tax returns during those years in question?
>
> The Witness: Yes. I think one of the characteristics of the third stage of alcoholism, which is very well documented in the literature, is that things that are important, consistent, habitual and significant seem to

loose, momentarily, or for long periods of time, their importance or their significance to an individual. . . ."

Asked as to what he based his opinion on that there was a causal relationship between the events and the failure to file the tax returns, the doctor stated (A. 56):

> "There is enough evidence, sufficient evidence from the previous history, then put together with the examination of the individual, that there is sufficient evidence to account for an illness, the illness having stages, and the stages showing themselves in such negligent behavior as failing to fulfill his specific responsibilities."

There are three stages to the illness: (1) blackouts with partial or total amnesia, (2) delirium tremens with hallucinations, convulsions or loss of consciousness, (3) altered attitudes and behavior of the individual, characterized by negligence toward previously held responsibilities, toward involvement in familial, civic and work life, and by a careless or slovenly attitude psychologically and physically (A. 56). On cross-examination the doctor said that he saw petitioner in all three stages (A. 58).

Thus it has been demonstrated that the evidence as a whole not only fails to prove, beyond a reasonable doubt, petitioner's required intent to withhold the extent of his tax liability from the government, but goes beyond this and establishes affirmatively that which is not required of a defendant; to-wit, that he did not know the extent of his tax liability until long after the last date for timely filing. Cf. **Toussie v. United States**, 397 U. S. 112. Petitioner could not have possessed the requisite moral turpitude or mens rea for that reason and also for the reasons of his own physical and psychological shortcomings covering the period in question, as established by lay witnesses and Dr. Niedorf.

Furthermore, the evidence clearly established that on April 15 following each of the years in question, the date

on which the return was due and the alleged offense (by statute and indictment not a continuing offense) must have been completely committed, petitioner did not have the information or records available from which he could have made a return. This information had to be gathered and prepared at a later date, after the investigation by the special agent began. If on such date petitioner committed any offense, it could only have been that of failure to keep records under Section 7203, not failure to file his return.

For all of these reasons and based upon the applicable law, the government failed to make a submissible case of willful failure to file income tax returns. Petitioner was entitled to a directed judgment of acquittal.

Because of the approval by the Eighth Circuit of a conviction without evidence of an essential element, which we believe is a departure from the basic constitutional requirement that there must be evidence of guilty intent before there can be a finding of guilt, and because of the apparent conflict with cases from other Circuits involving the evidence necessary to prove guilty intent, and because of the apparent conflict with applicable decisions of this Court, and because of the importance of a clear delineation by this Court of guidelines as to evidence necessary to prove the guilty intent requisite for a conviction under 26 U.S.C., § 7203, we respectfully submit that certiorari should be granted as to Question I.

II

Whether, in view of petitioner's stipulation and admission at the trial that he failed to file returns and that he had sufficient income to require the filing of returns, the government should have been permitted to introduce evidence of specific checks and items of petitioner's income.

Prior to the actual commencement of the trial, petitioner objected to the use of any checks in evidence in

excess of $600.00 on the ground that petitioner was willing to stipulate that he had income in excess of that amount for each year (A. 16-17). When the objection was overruled, petitioner then agreed to stipulate for purposes of the trial only, that his income was as alleged in each count of the indictment (A. 16-17). In opening statements, government counsel stated that petitioner stipulated that he did not file returns, and petitioner's counsel stated that "the defendant has conceded and stipulated that he did not file the tax returns for the years involved. Furthermore, the defendant has stipulated and conceded that he had income of a sufficient amount to have required him to have filed the tax returns."

Government's Exhibit No. 1 was a stipulation that petitioner "did not file an income tax return for each of the taxable years charged in the indictment, 1963, 1964 and 1965" (A. 17). Government's Exhibit No. 2 was a stipulation as to certain checks which were introduced in evidence and provided: "It is further stipulated that they were received by the said Douglas MacLeod in the year 1963 in payment or settlement of claims or litigation, and that a portion of the checks in excess of six hundred dollars represented fees for legal services rendered, and it is further stipulated that the copies of said checks and drafts may be admitted into evidence, subject to objection by defendant on grounds other than authenticity" (A. 22). Government's Exhibits Nos. 3 and 4 were similar stipulations for the years 1964 and 1965 (A. 22). The checks referred to in the stipulations and introduced into evidence over petitioner's objection (A. 22) amounted to $36,905.57 for 1963, $29,497.65 for 1964, and $24,693.34 for 1965. Over numerous objections by petitioner, there was considerable evidence of specific amounts and payments to petitioner, including testimony by the accountant, Mr. Feldman, as to various items of income on his worksheets and totals reflected on tax returns which he prepared (A.

17-18), testimony by Special Agent Noelker as to gross income for the years involved (A. 22), and testimony by attorney Joseph Cohn as to specific checks issued to petitioner (A. 24-25).

We believe that all of this evidence as to amounts of income and specific fees in particular cases had no place in these proceedings and should have been excluded upon petitioner's objections. In a case of this nature involving a failure to file a return, the amount of tax and the amount of income in excess of the minimal amount creating the duty to file a return are immaterial and irrelevant to the issues. In holding that such detailed evidence was admissible as bearing upon the issue of willfulness, the Eighth Circuit cited its earlier decision in **Lumetta v. United States**, 8 Cir., 362 F. 2d 644. But even in that case, the Court held (l. c. 647): "... prosecution for willful failure to file a return is imposed without regard to existence of a tax liability," citing **Spies v. United States**, 317 U. S. 492, in which this Court stated (l. c. 496):

> "Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability."

Whether petitioner had $600.00 or $600,000.00 of gross income was immaterial to the issues in this proceeding. In view of the stipulation by petitioner that he was required to file a return, evidence of specific amounts of income could only have been presented so as to prejudice the jury by the magnitude of the figures.

The issue as to the admissibility of such evidence was indeed raised in the **Lumetta** case. The Court ruled that the evidence as to the substantial amounts of money and profitable operation of the business were relevant **because of the particular defenses in the case**, but stated (p. 646 of 362 F. 2d):

> "No case has been cited on the precise question of admissibility of this type evidence in such cases as this and our research has disclosed none but such evidence appears without challenge in a numerosity of cases (cases cited). We hold, in addition to the necessity here to combat the defenses, that the disputed evidence was proper for the jury's determination of the question of willfulness in failure to file the tax returns."

No authority was cited to support the last sentence.

We believe that if the **Lumetta** case is to be followed, the instant case is distinguishable because in **Lumetta** there was an issue as to whether there had been a profitable operation and hence any taxes due, a defensive matter on the basic question of whether a return was required to be filed. In the instant case, petitioner had stipulated, for purposes of the trial, that a return was required to be filed, and so there was no defensive issue to which the evidence had relevance. Nor was the evidence material to the question of willfulness in this trial because petitioner did not dispute, and in fact had stipulated as to, the amounts set out in the indictment so as to avoid the necessity of the government's proof as to income. This stipulation, however, was based upon the fact that the figures disclosed by petitioner's accountant and the government's audit were substantially identical (A. 18, 22), and this in no way constituted an admission as to petitioner's knowledge of his income prior to the time of his accountant's audit. There was no attempt by petitioner to conceal income or to take any other action which could have been relevant to the intent question. Where a defendant admits the duty to file, we believe that proof of the amounts admitted is not probative of intent. If it were material to the question of willfulness, then the Court would be required to establish lines of demarcation as to where willfulness begins. Is evidence of $600.00 suffi-

cient, or must there be $6,000.00 or $60,000.00, to prove willfulness? It is obvious that the amount involved does not prove willfulness. In this case, the evidence of specific items of income bore no relationship to the issue of willfulness, especially as that issue was framed in the light of the defensive matters interposed by petitioner; to-wit, sloppiness, illness and procrastination. Specific amounts had nothing to do with these defenses.

A reverse but analogous situation appeared in **United States v. Gorman**, 7 Cir., 393 F. 2d 209, where the defendant sought to introduce certain checks to show his business expenses. The Seventh Circuit stated (l. c. 213):

> "Under the statute (26 U. S. C., § 7203), the Government had to show that defendant was required to file a return, that he did not do so, and that his failure to file was willful (cases cited). The Government was not required to prove that Gorman owed the Government any tax.
>
> "If Gorman had offered evidence that his failure to file was not willful because only a minimal tax was due, the checks would have been admissible (case cited). However, he testified that he was knowledgeable in the field of tax law and knew he was obligated to file a tax return if he had gross income in excess of $600, whether or not any tax was due. Therefore, proof that he owed a minimal tax was not relevant (case cited).
>
> "To support the admissibility of the checks, defendant relies on Lumetta v. United States, 362 F. 2d 644 (8th Cir. 1966). There the Government was permitted to show the corporation income of Stephens Cement Contractors, Inc., of which Lumetta was president, to show 'that Stephens was a going concern dealing in substantial amounts of money and operating at a profit; and that had Lumetta filed a return [for Stephens] it would have shown a tax owing to

> the government.' 362 F. 2d at pp. 645-646. The evidence was admitted to combat the 'defenses interposed,' one probably being that no tax was due. 362 F. 2d at p. 646. **Here the testimony shows that the amount of tax owing was not the reason Gorman did not file his tax returns, so that proof of tax liability was irrelevant.**" (Emphasis supplied.)

Likewise the testimony in the instant case showed that the amount of tax owing (unknown) was not the reason Mr. MacLeod did not file his tax returns. Proof of tax liability was irrelevant and the evidence should not have been admitted under the facts in this case.

Because of the apparent conflict between the Eighth and Seventh Circuits and the need for clarification by this Court of what evidence may be admitted in the trial of a failure-to-file case and what evidence should be excluded because of its irrelevancy and prejudicial effect upon the jury, we respectfully submit that certiorari should be granted as to Question II.

III

Whether petitioner should have been permitted at the pre-trial hearing to examine the IRS special agent concerning the effect of petitioner's political background on the motivation to prosecute petitioner.

At the hearing on the pretrial motions, petitioner's counsel asked IRS Special Agent Joseph Noelker whether he was aware of petitioner's political background, that he had run for office and that he had appeared before a Congressional committee. The agent answered the last question: "I did find out some information to the effect that I believe he did appear before a Congressional committee, yes." He was then asked when he first learned this fact. The government attorney then interrupted, but without an objection. After petitioner's counsel stated that he

thought defendant's "political background may be a motivating force behind this prosecution," the Court sustained "the objection" to the testimony (A. 14).

We believe that the Court erred in so restricting petitioner prior to trial. Had petitioner been permitted to continue, we feel that the evidence would have shown a "gross impropriety of the motivation of the Government's investigation of this case" similar to that which was sharply condemned in the additional separate opinion of Judge Madden, shared by Judge Hamley, in **Lenske v. United States**, 9 Cir., 383 F. 2d 20. In that case the investigation and prosecution were motivated by the defendant's political beliefs. The agent's report indicated that he made reference to other investigations and newspaper reports as to the defendant's politics and beliefs. As Judge Madden said (l. c. 27-28):

> "I regard what I have recited above as a scandal of the first magnitude in the administration of the tax laws of the United States. It discloses nothing less than a witch-hunt, a crusade by the key agent of the United States in this prosecution, to rid our society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put them in the penitentiary. No court should become an accessory to such a project."

We believe that in the instant case petitioner should have been permitted to explore this avenue to determine the motivation for the prosecution, especially where there was no jury present and the agent had acknowledged that he had information that petitioner had appeared before a Congressional committee. Under these circumstances, even if the assistant United States attorney had objected, petitioner was entitled to continue the inquiry.

The opinion of the Court of Appeals for the Eighth Circuit states that "an accused's political background is im-

material to his failure to file tax returns." We are not contending that political background would relieve a taxpayer of filing returns, but we do believe, as in the **Lenske** opinion, that political background is certainly material to the question of whether a criminal prosecution for failure to file may proceed. The subsequent refusal of the District Court to permit inspection of the presentence investigation report (see Question VI of this Petition) and the levying of the heaviest sentence in recent history of the District (see Appendix C and Question VII re Eighth Amendment) are further substantiation of the political motivation of the entire proceedings.

The Court of Appeals also states that petitioner "offers no evidence which even tends to suggest a 'bad faith' prosecution." It is true that petitioner offered no such evidence, because the trial Court would not permit further inquiry of the special agent. Not knowing what the agent might say, petitioner could not in good conscience make an offer of proof (A. 16). We believe, however, that if questioning had been permitted, the evidence could have been produced.

Because of the apparent conflict between the Eighth and Ninth Circuits and the need for clarification by this Court, we respectfully submit that certiorari should be granted as to Question III.

IV

Whether petitioner was entitled to Miranda warnings when first questioned by the IRS special agent.

The opinion of the Court of Appeals for the Eighth Circuit denied Miranda protection to petitioner. In so doing, the opinion is in direct conflict with the decision of the Seventh Circuit in **United States v. Dickerson**, 7 Cir., 413 F. 2d 1111.

At the pretrial hearing Special Agent Noelker testified that he first talked to petitioner on April 25, 1966 (A. 14). The first time he advised him of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution was when he met petitioner on August 22, 1966 (A. 14). It is apparent that Mr. Noelker had several phone conversations with petitioner between April and August. These phone conversations related to obtaining certain information and petitioner's consulting with an accountant (A. 14). During that period Mr. Noelker met personally with the accountant and obtained some of petitioner's information (A. 15). The accountant confirmed to Mr. Noelker shortly after the phone conversation with petitioner, and long before August, that petitioner had not filed a tax return (A. 16).

The opinion of the Court of Appeals is in error in stating that petitioner "furnished no information to the IRS agent at" the conversations prior to the Miranda warnings. From the testimony at the pretrial hearing, as well as at the trial, it is obvious that the Special Agent first contacted petitioner fully knowing that he had not filed tax returns and that there was a likelihood of a criminal violation. During the next several months, petitioner, not having been advised of his rights and being unaware that the investigation was of a criminal matter, furnished information to his accountant who in turn, at petitioner's direction, delivered such incriminating material to the Special Agent. It was not until the incriminating information had been delivered, with leads to clients, insurance companies, court proceedings, etc., that Mr. Noelker saw fit to advise petitioner of his Miranda rights. At this point it was too late. The damage had been done and the information which the agent had received was already tainted by the Constitutional violations; any subsequent information received by the agent was "fruit of the poisoned tree."

It is irrelevant that petitioner was an attorney. He was still entitled to a warning of his rights and that a criminal investigation was realistically foreseeable. Despite the fact that he was an attorney, petitioner's specialty was in the field of personal injury actions, and Mr. Noelker was aware that he had never represented a taxpayer as an attorney (A. 14, 30).

Under these circumstances, we believe that the Miranda warnings should have been given in the initial telephone conversation, under the doctrine of **Escobedo v. Illinois**, 378 U. S. 478, and **Miranda v. Arizona**, 384 U. S. 436, as expanded by **Mathis v. United States**, 391 U. S. 1, and **Orozco v. Texas**, 394 U. S. 324.

The Court of Appeals relied upon its prior decisions in **United States v. Brevik**, 8 Cir., 422 F. 2d 449; **Muse v. United States**, 8 Cir., 405 F. 2d 40, and **Cohen v. United States**, 8 Cir., 405 F. 2d 34, and presumably refused to follow **United States v. Dickerson**, 7 Cir., 413 F. 2d 1111. Thus there is a conflict between the Seventh and Eighth Circuits, and certiorari should be granted to resolve this conflict. In resolving this issue, we believe that this Court should adopt the doctrine of **Dickerson.**

The Eighth Circuit cases of **Cohen**, **Muse** and **Brevik** are in fact distinguishable from the facts in the case at bar. In **Dickerson**, it is noted that in the **Muse** case "some warnings were in fact given," and the **Cohen** case was characterized as one where "the absence of physical custody was considered determinative." In the instant case, not even partial warnings were given as in **Muse.** We believe that the absence of physical custody, considered significant in **Cohen**, should be reviewed in the light of **Orozco.** In **Brevik**, partial warnings were also given, but the Eighth Circuit declined to follow **Dickerson** on the basis of **Cohen** and **Muse.** We respectfully suggest that reliance on **Cohen** and **Muse**, decided prior to **Dick-**

erson, was misplaced and that **Dickerson** established the rule which is most consistent with **Escobedo, Miranda, Mathis** and **Orozco.**

Based upon these cases, we believe that petitioner was entitled to Constitutional warnings long prior to the meeting of August 22, 1966. It is true that at the trial petitioner testified and stipulated to some of the matters which the agent learned in the interval between April and August. Petitioner admitted at the trial that he did not file the required returns and that he had sufficient income to require filing. Such admissions were a result of the incriminating information obtained by the Special Agent. Without his having such information, it is quite possible that petitioner would not have agreed to such a stipulation. At the very least, petitioner should have been able to decide trial strategy without the tainted evidence being used against him.

Because of the conflict between the decisions of the Eighth Circuit herein and that of the Seventh Circuit in the **Dickerson** case and the further conflict with the decisions of this Court in the **Escobedo, Miranda, Mathis,** and **Orozco** cases, and because of the importance of this issue in the enforcement of the tax laws and the frequency with which the issue has arisen and will continue to arise, we respectfully submit that certiorari should be granted as to Question IV.

V

Whether the trial Court erred in giving portions of the charge and in refusing to give instructions offered by petitioner.

In the charge, the trial Court read the three-count indictment to the jury. Each count charged that petitioner had income by reason of which he was required to make

an income tax return, "that well knowing all of the foregoing facts, he did willfully and knowingly fail to make said income tax return . . ." (A. 3-5). The Court then went on to define "knowingly" (A. 8):

> "'Knowingly' as used in these instructions means that state of mind wherein a defendant was in possession of facts from which he knew, or was aware that he could not legally do or fail to do the acts whereon he here stands charged."

Petitioner objected to the giving of this instruction and to the use of the word "knowingly" in the indictment. The basis of the objection was that the statute under which petitioner was tried did not contain that word in defining the offense. Section 7203 of Title 26, United States Code, provides:

> "Any person required under this title . . . to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . ."

Petitioner believes that the injection of the word "knowingly" into the instructions, a result of its superfluous inclusion in the indictment, gave the jury an erroneous test for the determination of guilt. It is not analogous to the situation in **Jaben v. United States**, 8 Cir., 349 F. 2d 913, cited by the Court below, where the additional word did not appear in instructions (it being a jury-waived case), and where the words in the indictment were in fact synonymous. **Jaben** involved affirmative and intentional acts of commission; here we have acts of omission.

"Knowingly" and "willfully" in this type of an offense are not synonymous. **United States v. Murdock**, 290 U. S. 389. They are conflicting standards of the mens rea necessary to convict. It is not an offense to knowingly fail to file a return. Knowledge of the failure to file could

exist in many instances where such failure would not be illegal (e. g., sickness, mistake, etc.). Willfulness is the requirement of the statute and should have been the only test submitted to the jury.

Thus the trial Court erred in submitting that portion of the charge to the jury. The Court should have granted petitioner's request to strike the word "knowingly" from the proceedings and to omit any reference to the word "knowingly" in the determination of the guilty intent.

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The Court did give an instruction defining the word "willful" (A. 8):

> "The word 'willful' as used in the statute involved in this case means voluntary, purposeful, deliberate, and with specific intent to do that which the law forbids, as distinguished from accidental, inadvertent or negligent. The requirement that failure to make and file the returns in question be done willfully exists so that the accused will not be convicted of failing to make or file such returns because of mistake or inadvertence. If the jury believes that the defendant acted with negligence, inadvertence, mistake, or due to his good faith misunderstanding of the requirements of the law, his act was not willful. On the other hand, if his act was one with bad purpose either to disobey or disregard the law then his act was willful. In this connection you are instructed that the only bad purpose or evil motive which the government must prove in this case is the deliberate intention not to file a return which the defendant knew the law required him to file so that the government would not know the the extent of his liability."

Petitioner believes that this instruction was erroneous because it was couched in broad, general terms of defenses of negligence, inadvertence, mistake, accident or good faith misunderstanding of the law. But these were not the de-

fenses in this case; here the defense was based upon the three reasons for not filing the returns, to-wit: sloppiness, personal drinking problems and procrastination (A. 22).

Petitioner never did claim that his failure to file returns resulted from an accident, inadvertence, mistake or misunderstanding of the law. There was, of course, evidence as to his negligent methods of operation, but primarily the defense was based upon the drinking problems and the lack of an efficient system of record keeping. These were defensive matters on the issue of willfulness; they should have been included in this portion of the charge. Omitting them must have created the impression in the minds of the jury that they were not to consider these defenses. The evidence established conclusively that these defenses were real and, having been established, they negated the willfulness necessary for conviction. Accordingly, the defenses should have been included in the willfulness instruction.

Furthermore, the "willful" instruction was erroneous in its use of the "bad purpose" test without further definition. The jury was free to decide what the bad purpose might be. They could have used any standards personal to themselves without regard to the requirements of the law. What may have been a bad purpose for one, or even twelve, jurors could have been far different from the criminal intent necessary for conviction. The standard required of the jury ignored the requirement of moral turpitude or mens rea. The charge ignored the requirement of the specific intent on the part of petitioner to withhold the extent of his tax liability, and not merely that the effect of his conduct was to prevent the government from knowing the extent of his tax liability. If the Court so intended, it is not clear from the charge itself and is vital to a proper finding by the jury. Cf. **United States v. Litman**, 3 Cir., 246 F. 2d 206, 209.

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The Court gave the following instruction at the request of petitioner (A. 8):

> "It is the position of the defendant that the Government has failed to produce evidence that the defendant willfully failed to file the tax returns required. It is his further position that it has not been proven beyond a reasonable doubt that the defendant had the required intent to be guilty of a violation of the law."

However, the Court refused to give an additional portion of the offered instruction (A. 9):

> "It is the position of the defendant that he did not have the required guilty intent and certainly, in this connection, there is a reasonable doubt that he had the required guilty intent."

We submit that the omitted portion should have been given because it was a fair and proper statement of petitioner's position in the case. Its omission resulted in the jury being inadequately apprised of what petitioner's position was.

REFUSED INSTRUCTIONS

The opinion of the Court of Appeals devoted scant attention (one paragraph) to petitioner's objections to the charge as given. But there was no discussion in the opinion of the numerous instructions which were offered by petitioner but refused by the trial Court, even though the erroneous refusal to give them was argued by petitioner in the Court of Appeals.

The instructions offered by petitioner but refused by the trial Court were the following:

Instruction No. 1

> "The crimes charged in this case require proof of specific intent before the defendant can be convicted.

> Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires to be done, intending with bad and evil purpose either to disobey or to disregard the law" (A. 9).

We believe that this instruction was a proper statement of the law in conjunction with other instructions. It is patterned after LaBuy, Jury Instructions in Federal Criminal Cases, Section 4.04, page 20, and was not covered by any instructions given by the Court.

Instruction No. 2

> "Under our system of laws men are not punished criminally for mistakes, mismanagement, carelessness or errors of judgment. They are punished only for intentional wrongdoing. The defendant here is not on trial for errors of judgment or mistakes or mismanagement, but is on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, and it is incumbent upon the Government to prove such evil and criminal intent to your satisfaction and beyond a reasonable doubt before you can return a verdict of guilty" (A. 9).

This instruction was proper under the circumstances of this case and more appropriately meets the requirement of moral turpitude or mens rea. It was especially appropriate in view of the defenses of sloppiness in business affairs and procrastination in combination with the personal drinking problems.

Instruction No. 3

> "The court instructs the jury that it devolves upon the Government to show by evidence to the satisfac-

tion of the jury beyond a reasonable doubt every material fact necessary to constitute the crime with which the defendant stands charged, and if the jury has a reasonable doubt arising from the insufficiency of the evidence of the existence of any such material fact, the jury should acquit the defendant" (A. 9-10).

We believe that this instruction was a proper statement of the law and was not given in any of the instructions given by the Court. Although the Court did instruct separately on the elements of the offense and did instruct generally on the government's burden, nowhere in any of the instructions did the Court place the burden of showing by evidence to the satisfaction of the jury and beyond a reasonable doubt all of the elements required to prove the charge. Such failure constituted error.

Instruction No. 4

"Before you can find the defendant Douglas MacLeod guilty in this case you must find that his failure to file the required return for the year in question was motivated by the specific intent to withhold from the Government information as to the extent of his tax liability. Unless you are convinced beyond a reasonable doubt that he was motivated by such a specific intent, you must find him not guilty with respect to the year or years in question" (A. 10).

This instruction was a proper statement of the law, within the doctrine of **Spies v. United States**, 317 U. S. 492, 498, and **Haner v. United States**, 5 Cir., 315 F. 2d 792.

Instruction No. 5

"The Court instructs the jury that you may not find the defendant guilty as to any count unless you find that the defendant acted as a result of his own moral turpitude, that is, as a results of baseness, vile-

ness, or depravity in the private and social duties which according to the accepted standards of the time a man owes to his fellow man or to society in general" (A. 10).

This instruction was not covered by any of the other instructions given by the Court. The definition of moral turpitude is similar to that which may be found in Black's and Bouvier's Law Dictionaries, and involves the legal concept of mens rea.

Instruction No. 6

"By reasonable doubt is meant a doubt which from the evidence or absence thereof you find a reason" (A. 10).

Although the Court did give an instruction on reasonable doubt, it merely defined it as a doubt "which is reasonable in view of all the evidence." The Court's instruction did not point out, as did petitioner's offered instruction, that a reasonable doubt may arise from the absence of evidence. Such omission was error.

Instruction No. 7

"The Court instructs the jury that under the law the defendant is presumed to be innocent of the crime charged against him, and so strong is this presumption that it clings to him, surrounds, shields, and protects him, through the entire trial of this case, and until and unless such presumption is overcome by evidence which proves him guilty beyond a reasonable doubt. Such evidence, in order to warrant a conviction, must be clear, satisfactory, and abiding, fully satisfying the mind and conscience of each and every juror. It is not sufficient in a criminal case to justify a verdict of guilty that there may be strong suspicion, or even strong probability, of guilt, but the law requires proof

of legal and credible evidence of such a nature that, when it is all considered, it produces a clear, undoubting, and entirely satisfactory conviction of the defendant's guilt. The burden of proof is upon the government to make out and establish by the evidence, beyond a reasonable doubt, and to the satisfaction of the jury, every fact and circumstance necessary to prove his guilt, and unless his guilt is so established, the jury must find him not guilty" (A. 10-11).

Although the Court did give an instruction on the presumption of innocence, we believe the Court's instruction was not adequate and that Instruction No. 7 was a more appropriate statement of the law.

Instruction No. 8

"The defendant is charged with a willful failure to file income tax returns for the years in question. An omission is 'willful', if it is done voluntarily and intentionally, and with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose or evil intent either to disobey or to disregard the law.

In this regard 'willful' means intentional, knowing or purposeful. It does not mean careless, thoughtless, heedless, inadvertent or negligent" (A. 10).

We believe that this instruction was a proper statement of the applicable law of the intent necessary for conviction under Section 7203. It was a more appropriate definition, under the facts and circumstances of this case, than that given by the Court on the definition of willfulness (A. 8). The offered instruction was authorized by **Spies v. United States**, 317 U. S. 492, **United States v. Palermo**, 3 Cir., 259 F. 2d 872, **Haner v. United States**, 5 Cir., 315 F. 2d 792, **United States v. Vitiello**, 3 Cir., 363 F. 2d 240,

and **Gennaro v. United States**, 8 Cir., 369 F. 2d 106. See also Mathes and Devitt, Federal Jury Practice and Instructions, Section 13.13, page 149.

Instruction No. 9

"The court instructs the jury that the only issue of fact which you are to determine in this case is whether or not the defendant's failure to file the income tax returns, as required by law, was a willful and intentional failure, and unless you find this issue in favor of the government beyond a reasonable doubt, then you must find the defendant not guilty.

The court further instructs the jury that the Government has not produced any direct or positive evidence of the defendant's intent but has sought to prove the element of intent by circumstantial evidence. Circumstantial evidence is proof of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of man.

Circumstantial evidence should always be cautiously considered, and in this connection you are instructed that in order to convict a person of a crime where the Government relies on circumstantial evidence, it is not sufficient that the facts proven coincide with, account for or even render probable the hypotheses sought to be established, but they must exclude every other hypothesis but the ones sought to be established, namely, the required guilty intent. The facts and circumstances proven by the Government must be consistent with each other and with the guilt of the defendant and absolutely inconsistent with the innocence of the defendant and wholly incapable of explanation upon any other reasonable theory except that of the defendant's guilt. If the facts and circumstances proven by the Government on the issue

> of the defendant's intent are in any way consistent with lack of intent or can be explained upon any other reasonable theory except that the defendant had the required guilty intent, then you must return a verdict of not guilty'' (A. 11-12).

Although the Court did instruct on circumstantial evidence, we believe the instruction was inadequate. That offered by petitioner was a more appropriate instruction on circumstantial evidence under the facts and circumstances of this case, and should have been given.

* * * * * * *

For all of the foregoing reasons, we believe that the charge as given by the trial Court was erroneous and did not properly state the elements of the offense applicable to the facts and circumstances which appeared in evidence in this particular trial. The Court of Appeals, in summarily approving a charge which did not conform to controlling decisions and in ignoring all instructions offered by petitioner, failed to afford petitioner a meaningful judicial review of important issues.

Because of the apparent conflict of the decision of the Eighth Circuit herein with decisions of other Circuits and of this Court on the elements of the offense and because of the departure by the Court of Appeals from the accepted and usual course of judicial proceedings applicable to appellate review of allegations of error, we respectfully submit that certiorari should be granted as to Question V.

VI

Whether petitioner should have been permitted to examine the presentence investigation report prior to sentencing.

Rule 32 of the Federal Rules of Criminal Procedure provides for preparation and submission to the Court

prior to sentencing of a presentence investigation report. Rule 32 (c) (2) provides in part:

> ". . . The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the pre-sentence investigation and afford an opportunity to the defendant or his counsel to comment thereon . . ."

We recognize that this rule, and the cases which have to date interpreted it, make disclosure a matter of discretion with the trial judge. But see Katkin, "Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues," 55 Minn. L. Rev. 15 (November 1970), suggesting a defendant's right, of constitutional magnitude, to examine and refute such reports. Whether or not petitioner had a constitutional right to see the report in the instant case, we believe the Court here abused its discretion in refusing to make the report available.

Prior to sentencing, petitioner's counsel requested an opportunity to examine the presentence investigation report, but the trial Court refused the request without explanation (A. 67). In view of the indication at the pretrial hearing as to possible political motivations of this proceeding (A. 14), in view of the Special Agent's testimony that he had information from insurance companies, clients, other attorneys and defendants with whom Mr. MacLeod had had dealings (A. 22), and in view of the fact (as appears from proceedings, after docketing of the appeal in the Court of Appeals, concerning travel restrictions imposed upon petitioner by the trial Court), that certain information relating to petitioner's background had not appeared during the trial,[4] we believe that there must

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[4] At the time of sentencing, the trial Court set bond for petitioner pending appeal in the amount of $10,000.00, one of the conditions of the bond being that petitioner not depart from the jurisdiction of the District Court for the Eastern District of Missouri. When subsequently ordered by the Court of Appeals, pursuant to Rule 9(b) of the Federal Rules of Appellate Pro-

have been material in the presentence investigation report which petitioner should have had an opportunity to examine and comment upon.

It is quite possible that considerable erroneous information, speculation, and unfounded accusations concerning petitioner's prior political activity and philosophy could have been included in the report. It is also quite possible that when clients, business associates, opponents, and attorneys associated with and against petitioner were interviewed, some irritations may have crept into the report. Petitioner should have been given an opportunity to respond to any unfavorable reports.

In view of the heavy sentence, which was grossly excessive for an ill and aged first offender, and the unusual conditions of probation to take effect after completion of the term of imprisonment, we can only conclude that there must have been erroneous or highly prejudicial information in the report. Fairness demanded that petitioner be given an opportunity to examine it and answer it.

This is not a case of secret informants or other matters of security to persons or government which might justify a denial of the request to inspect. We can imagine no valid reason why the report should have been kept secret from petitioner.

We believe that the Court of Appeals was in error in concluding that petitioner demonstrated no abuse of discretion in this case. But irrespective of discretion, we believe, as suggested by Professor Katkin, that petitioner

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cedure, to state written reasons for such travel restrictions, the District Court referred to petitioner's prior travels abroad, about which there was no evidence in the record. Presumably such information came to the District Court in the presentence report. (The Court of Appeals ultimately permitted petitioner to travel outside the geographical limitations of the District Court.)

was entitled, as a matter of constitutional right, to examine the report.

Because of the importance of this issue in the sentencing process and a need for guidelines and clarification by this Court as to the right of every defendant about to be sentenced to know the nature of accusations against him, we respectfully submit that certiorari should be granted as to Question VI.

VII

Whether the statute under which petitioner was convicted (26 U. S. C., Section 7203), is constitutional as written and as applied to petitioner in this case.

Petitioner believes that Section 7203 of Title 26, United States Code, is constitutionally deficient, both in the manner in which it has been written and as applied to petitioner in this particular case. It provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Petitioner, being unable to find any reported decisions of this Court in which the constitutionality of Section 7203 had been decided, made a sincere and good faith constitutional attack upon the statute in the Court of Ap-

peals. The Eighth Circuit's summary disposition of the issues suggested that some of petitioner's contentions were frivolous. We respectfully suggest that there is merit to petitioner's arguments, and that this Court ought to examine these constitutional issues.

Section 7203 violates the Fourth, Fifth, Eighth, Tenth and Thirteenth Amendments to the Constitution of the United States, in the following respects:

Fourth Amendment

Section 7203 and related statutes and regulations require any person, including petitioner, "to pay any . . . tax . . . to make a return . . . keep any records, or supply any information" to the government. A special Agent of the Internal Revenue Service is clothed with the authority, which Mr. Noelker here exercised, to secure all of the taxpayer's books, records and information. No safeguards are provided for any review by a neutral and detached magistrate prior to seizure to test the limits of the search and seizure powers available to and exercised by the government. The requirements of the statute as to making returns and supplying records and information to the government compel the taxpayer to subject himself to an unreasonable and warrantless search and seizure, without limitation on the government and without any indication of the commission of a crime, within the traditional sense.

Fifth Amendment

A. Section 7203 violates that portion of the Fifth Amendment which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." It is a criminal offense under the statute for any person to fail to pay a tax or to make a return or to keep records or to supply information. Petitioner

here was charged with the failure to make returns, but obviously related to any such charge would be the failure to pay taxes and to keep records and to supply information. Any one of these additional violations could have been committed under the same factual circumstances, and the statute thus subjects any person to multiple prosecutions arising out of the same set of facts. A defendant who might attempt to comply with one portion of the statute could incriminate himself as to other portions of the statute in that he might file a return but nevertheless violate the law by not paying the tax, or he might pay the tax set out in the return but not have kept sufficient records, or he might do other affirmative acts required and yet not supply additional information to the government. In addition, acts which are required for compliance with Section 7203 could also lead to felony prosecution under Section 7201 of Title 26, United States Code, for willful evasion of taxes.

B. The self-incrimination provisions of the Fifth Amendment are also violated by Section 7203 because the mere act of filing a return and supplying the information required by such a return would supply information to the government which could lead to prosecutions for violation of the failure-to-pay provisions of Section 7203 or the willful tax evasion provisions of Section 7201. Cf. **Albertson v. Subversive Activities Control Board,** 382 U. S. 70; **Marchetti v. United States,** 390 U. S. 39; **Grosso v. United States,** 390 U. S. 62; and **Haynes v. United States,** 390 U. S. 85. Any taxpayer might thus be caught in the dilemma of choosing whether to violate a misdemeanor section by not filing a return or supplying information which would incriminate him under a felony statute. The Fifth Amendment prohibits the requirement of such a choice. See **Garrity v. New Jersey,** 385 U. S. 493, 497; **Spevack v. Klein,** 385 U. S. 511, 515; and **Simmons v. United States,** 390 U. S. 377, 394.

C. Section 7203 vaguely requires certain conduct, affirmative in nature, without detailing precise requirements of the taxpayer. There are, of course, civil penalties in other sections of the Internal Revenue Code for doing or failing to do certain tax requirements, but to impose criminal sanctions upon a taxpayer for failure to affirmatively comply with such vague standards constitutes a deprivation of liberty or property without due process of law. Cf. **United States v. L. Cohen Grocery Company,** 255 U. S. 81.

Eighth Amendment

A. Section 7203 violates the Eighth Amendment prohibition against inflicting cruel and unusual punishment. It condemns by imprisonment or fine or both, among other things, the failure to pay a tax or to make a return. Unpaid taxes are debts. **Price v. United States,** 269 U. S. 492, 499. Cf. **Spies v. United States,** 371 U. S. 492. Provision of criminal penalties as a tool in the debt collection process, absent fraud, oversteps the boundaries of constitutional authority. Although not expressly set out in the United States Constitution, as it is in most if not all State Constitutions, imprisonment for debt is certainly not one of the powers delegated to the Federal Government and would appear to be violative of the entire spirit of the Constitution and in particular the Eighth, Tenth and Thirteenth Amendments. The absence of any such express prohibition can be explained on historical grounds. The taxes and other obligations owed by private citizens to the Federal Government were, at the time of the adoption of the Constitution and of the Bill of Rights, very limited. The enormous tax structure now extant has been a development of much more recent origin. Cf. **Spies v. United States,** 371 U. S. 492, 498.

B. Section 7203 is violative of the Eighth Amendment both as written and as applied to petitioner in this case.

The statute provides for a fine of not more than $10,000.00 or imprisonment for not more than one year or both, in addition to other civil penalties. The heavy fine permitted under the statute is most unusual; research has failed to disclose any other federal or state statute prescribing a fine of $10,000.00 on a misdemeanor charge. In most statutes the maximum fine for misdemeanors is $1,000.00. Obviously a fine of $10,000.00 is most unusual and was apparently intended for corporate defendants not subject to prison terms or those cases involving flagrant violations by wealthy individuals. A serious question arises as to constitutionality per se under the Eighth Amendment of this provision for a $10,000.00 fine in a misdemeanor case.

Irrespective of the terms of probation, the basic sentence of one year imprisonment and a $10,000.00 fine imposed upon petitioner constitutes an excessive fine and cruel and unusual punishment within the prohibition of the Eighth Amendment. The impropriety is especially apparent when comparison is made with sentences imposed in similar cases. Petitioner has reviewed the records in the Clerk's office of the Eastern District of Missouri for all prosecutions since 1963 for violations of Section 7203. Information from these files, except those involving gambling matters, has been included in Appendix C to this petition. Petitioner's sentence is by far the most severe of any imposed in the District! Investigation has found no case in which the maximum term of imprisonment and the maximum fine were imposed. In addition, there is of course the possibility here of additional sentences and fines which might be imposed and assessed subsequently because of the probation provisions as to Counts II and III. (One of the cases in Appendix C, No. 70 Cr 37(2), involved a lawyer sentenced on three counts of failure to file tax returns—the sentence was six months imprisonment and no fine.)

We have not attempted to research sentences in other districts or circuits. But of those which we have casually encountered, none has been as severe as in this case. See, for example, **United States v. Cirillo**, 3 Cir., 251 F. 2d 638, **United States v. Goldman**, 3 Cir., 352 F. 2d 263, and **United States v. Overton**, 4 Cir., 359 F. 2d 28.

We believe also that the terms of the probation (A. 67) are constitutionally invalid as amounting to cruel and unusual punishment. For a period of five years after the completion of the imprisonment, petitioner has the heavy sword of an additional two years imprisonment and $20,000.00 fine suspended over him. During that time he must "remain gainfully employed in some activity which I assume will not be the practice of law and . . . not take a drink" (A. 67). It is certainly cruel and unusual to require gainful employment of a man past the customary age of retirement with a history of two heart attacks and other physical disabilities, especially where his only means of earning a livelihood, the practice of law, is, according to the District Court's assumption, to be denied him (A. 67).[5] Finally, in view of the testimony in this case as to petitioner's illness, the time might arise when compliance with the requirement that he not take a drink would be impossible. Cf. **Powell v. Texas**, 392 U. S. 514.

Considering the imposition of the maximum sentence and the assessment of the maximum fine on one count and the restrictive probation conditions on the other two counts in the light of the circumstances of this case and other similar cases, we believe the sentence here imposed on petitioner is cruel and unusual and violative of the Eighth Amendment.

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[5] This is all the more reason why petitioner should have been permitted to explore the political motivations for this prosecution and to examine the presentence investigation report. See Questions III and VI of this petition.

Tenth Amendment

Police powers are reserved to the States by virtue of the Tenth Amendment. The federal government has only those powers expressly delegated to it in the Constitution; it has no police powers. As said in **Rochin v. California,** 342 U. S. 165:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers."

Where police power exists, as in the states, statutes requiring no criminal intent may be valid. Where no general police power exists, as in the case of the federal government, moral turpitude or mens rea should be an element, or the statute runs afoul of the Tenth Amendment.

Any discussion of moral turpitude or mens rea in relation to the Constitution must consider a line of Supreme Court cases dealing generally with the subject. **Shevlin-Carpenter Co. v. Minnesota,** 218 U. S. 58; **United States v. Balint,** 258 U. S. 250; **United States v. Behrman,** 258 U. S. 280, and **United States v. Dotterweich,** 320 U. S. 277. These cases have been inferentially but not expressly limited in **Morisette v. United States,** 342 U. S. 246, and **Lambert v. California,** 355 U. S. 225. In view of the conflict apparent in these cases, a question is presented for resolution by this Court. It is the position of petitioner, as it is of Professor Herbert L. Packer in his article "Mens Rea and the Supreme Court", 1962 Sup. Ct. Rev. 107, that the sanction of criminality and consequent imprisonment should be restricted to conduct involving moral turpitude or mens rea. This Court has said, in citing the Packer article with approval, that, as yet, it "has never articulated a general constitutional doctrine of mens rea". **Powell v. Texas,** 392

U. S. 514 (at fn. 27), Mr. Justice Marshall continuing in the principal opinion:

> "We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."

We believe that it is appropriate now for this Court to "articulate a general constitutional doctrine of mens rea." See Packer, supra.

If a constitutional doctrine of mens rea be established, it is the position of petitioner that Section 7203 must fall. Congress, lacking police power, cannot accomplish the same purpose indirectly by an extension of its taxing power. Section 7203 is deficient in this respect. The use of criminal penalties by the federal government purely as an aid in tax collection (as distinct from punishment for fraud or willful evasion of taxes—involving moral turpitude or mens rea), especially when there are already such efficient and powerful civil enforcement measures, is an attempted exercise of police power. The Tenth Amendment and the dual sovereignty and delegation of powers concepts deny such power to the federal government. If the contrary view is taken; to-wit, that this statute is not an exercise of general police power and that moral turpitude or mens rea is required for conviction (embraced in the term "willful"), then there is in this case a glaring insufficiency of the evidence.

Thirteenth Amendment

The Thirteenth Amendment prohibits slavery and involuntary servitude except as a punishment for crime. The use of criminal sanctions in Section 7203 to enforce civil obligations for taxes violates this amendment. In the collection of taxes plus civil penalties and interest, the government has the most awesome tools of enforcement known to any creditor. See 26 U. S. C., § 6861. Cf. **Sniadach v. Family Finance Corporation of Bay View**, 395 U. S. 337. Where only passive conduct, the failure to make a return or to pay a tax or to supply information or to keep records is involved, such a criminal statute as Section 7203 is a departure from traditional concepts of Anglo-Saxon jurisprudence. An essential element of crime; to-wit, criminal intent—moral turpitude or mens rea—is not included as an essential element of the offense. The omission of this element is permissible only in the exercise of a (nonexistent) police power.

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As pointed out above, Section 7203 violates the Fourth, Fifth, Eighth, Tenth and Thirteenth Amendments to the Constitution of the United States, particularly in its application to petitioner.

It has been said that the power to tax is the power to destroy, and such was the case when the power was in the hands of the king. We respectfully suggest that the federal government has assumed royal perogatives in this case, which the letter and spirit of the Constitution forbid.

Because of the necessity of a decision by this Court of these important questions of federal constitutional law involved in Section 7203, not only in the application to petitioner but also to countless other present and future defendants, we respectfully submit that certiorari should be granted as to Question VII.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

IRL B. BARIS

LEONARD J. FRANKEL
NEWMARK and BARIS
721 Olive Street
St. Louis, Missouri 63101
Attorneys for Petitioner